No. 89-16

Supreme Court, U.S.
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IN THE

Supreme Court of The United States

OCTOBER TERM 1988

BINGHAM TOYOTA, INC., a California corporation,
BYRUM BINGHAM and CRAIG TUCKER, individually,

Petitioners,

v.

RICHARD VIZZOLINI and DAVID GROWDON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents filed charges with the National Labor Relations Board (NLRB) alleging retaliatory discharge in violation of Sections 7 and 8 of the National Labor Relations Act (NLRA). The NLRB conducted an investigation and issued a complaint. Subsequently, Respondents brought a state action for retaliatory discharge based upon the same conduct alleged in the NLRB complaint. Under these circumstances,

1. Do Sections 7 and 8 of the NLRA completely preempt the state action?

2. Does the United States District Court have removal jurisdiction under 28 U.S.C Sections 1441, 1331, and 1337 to decide preemption resulting from Sections 7 and 8 of the NLRA?

PARTIES

The Petitioners are Bingham Toyota, Inc., a California corporation, operating an automobile dealership in Clovis, California, and Byrum Bingham and Craig Tucker, who are respectively the President and General Manager of Bingham Toyota, Inc.

Respondents are David Growdon and Richard Vizzolini.

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v.

RICHARD VIZZOLINI and DAVID GROWDON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Bingham Toyota, Inc., Byrum Bingham, and Craig Tucker respectively pray that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 3, 1989, which holds (1) that the Federal District Court did not have jurisdiction to determine that the state court wrongful discharge action of four salesmen was preempted because the National Labor Relations Board had already taken jurisdiction over the salesmen's claims by issuing a complaint alleging the same conduct that the salesmen alleged in their state action and (2) that Section 7 and Section 8 of the National Labor Relations Act do not completely preempt the salesmen's state court action.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit, reported at 871 F.2d. 109, 131 LRRM 2043, is reprinted in Appendix A.[1] It reverses a judgment of the United States District Court for the Eastern District of California based upon two Memoranda and Orders not reported, which are reprinted as Appendices B and C, respectively.

JURISDICTION

The judgment of the United States Court of Appeal for the Ninth Circuit was entered on April 3, 1989, reversing the decisions of the Federal District Court, Eastern District of California, dated January 5, 1988 (Appendix B), and July 30, 1987 (Appendix C), ruling that the Respondents' state court action was preempted by the National Labor Relations Act under the exclusive jurisdiction of the National Labor Relations Board. This petition is filed within ninety (90) days of April 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTES INVOLVED

The relevant statutory provisions are the National Labor Relations Act ("NLRA"), as amended, Section 7 (29 U.S.C. § 157) and Section 8(a) (29 U.S.C. § 158(a)); and United States Code, Judiciary and Judicial Procedure Section 1441(b) (28 U.S.C. § 1441(b)), Section 1331 (28 U.S.C. § 1331), and Section 1337(a) (28 U.S.C. § 1337(a)). They are reprinted as Appendix F.

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[1] The pages of the Appendix to this petition are referred to as "App."

STATEMENT OF THE CASE

Summary of Facts

Respondents Richard Vizzolini ("Vizzolini") and David Growdon ("Growdon") were salesmen for Petitioner Bingham Toyota, Inc. ("Bingham Toyota"). In February of 1987, Respondents filed charges with the National Labor Relations Board ("NLRB"), Region 32, against Bingham Toyota. Growdon and Vizzolini alleged that Petitioners Byrum Bingham and Craig Tucker, as agents of Bingham Toyota, threatened them with the elimination of certain employee benefits and subsequently discharged them because they concertedly refused to contribute to a request for contributions towards a Christmas gift for Byrum Bingham. Based upon these allegations, the Regional Director issued an NLRB complaint alleging that Bingham Toyota had interfered with Respondents' rights guaranteed under Section 7 of the National Labor Relations Act ("NLRA") and thereby engaged in unfair labor practices under Section 8(a) of the NLRA (Appendix D).

In March of 1987, Respondents filed and served their state court complaint in Fresno, California, alleging five causes of action (Appendix E). The first three actions allege wrongful discharge in violation of public policy, in violation of implied covenant of good faith and fair dealing, and in breach of contract; the fourth and fifth causes of action allege employer blacklisting and kickbacks in violation of California Labor Code Section 1054 and California Business and Professions Code Section 17200, respectively.

Respondents' state court allegations are essentially the same as the allegations charged by the Regional Director. Respondents claim that Bingham Toyota employed them and demanded "Christmas gifts." Respondents alleged that, when they refused to contribute, Bingham Toyota threatened loss of employment benefits, eliminated some benefits, eventually terminated their employment and subsequently misrepresented Respondents' employment performance to other prospective employers. The gist of both complaints before the

NLRB and the state court was that Respondents refused Bingham Toyota's request to contribute to a Christmas gift for Byrum Bingham and consequently suffered reprisals.

The District Court Decision

On April 9, 1987, Petitioners removed the state action to the United States District Court for the Eastern District of California. On April 15, 1987, Petitioners brought a motion to dismiss based upon the doctrine of federal preemption pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6) or, in the alternative, Rule 56. Petitioners contended that Respondents' complaint was artfully pleaded and, therefore, removable because it alleged the same conduct Respondents relied upon to support their federal action before the NLRB under Section 7 and Section 8 of the NLRA. For the same reason, Petitioners moved to dismiss Respondents' action as preempted by the exclusive primary jurisdiction of the NLRB.

On May 6, 1987, Respondents brought a counter-motion for remand pursuant to 28 U.S.C. Section 1447(c) and Local Rule 30. The District Court heard both motions on June 8, 1987, and issued its first decision on June 30, 1987 (Appendix C). In that decision, the District Court ruled that it had jurisdiction to determine whether the Respondents' actions were preempted by the NLRA because of the exclusive jurisdiction of the NLRB. After comparing the Respondents' state court complaint with the NLRB complaint, the District Court ruled that the first, second, third, and fifth causes of action were preempted by Section 7 and Section 8 of NLRA. However, the District Court initially found no preemption on the fourth cause of action and remanded the matter to state court. Petitioners brought a motion for reconsideration, and, after further briefing, the District Court granted the motion for reconsideration and dismissed the entire complaint as preempted (Appendix B).

The Court of Appeals Decision

Respondents appealed to the United States Court of Appeals for the Ninth Circuit on the grounds that the removal

was improper and that the state action was not preempted. The Court of Appeals reversed the decision of the District Court on the ground that the state court action could not be removed to federal court. *Holcomb v. Bingham Toyota* (9th Cir. 1989) 871 F.2d. 109, 131 LRRM 2043. Relying on its recent decision in *Ethridge v. Harbor House Restaurant* (9th Cir. 1988) 861 F.2d 1389, 130 LRRM 2001, the Ninth Circuit ruled that no federal question was discernable on the face of Respondents' complaint and that the artful pleading doctrine did not establish federal jurisdiction because Section 7 and Section 8 of the NLRA do not completely preempt state law. *Bingham Toyota, supra,* 871 F. 2d at 111 (Appendix A).

REASONS FOR GRANTING THE PETITION

The waters of labor management relations are too often cloudy and turbulent. By granting this petition, this Court can swiftly and effectively clear and still a body of labor law that has remained a source of uncertainty for 30 years—federal removal of state claims preempted by Sections 7 and 8 of the NLRA. Without this Court's clarification, state actions preempted by the *Garmon* doctrine[2] will continue to clog the channels of national administration of labor law with pointless litigation.

This case provides simple and apt facts to resolve the confusion in recent labor decisions concerning preemption and removal. Respondents filed their charges with the NLRB. The NLRB asserted jurisdiction by issuing a complaint.[3] Respondents then brought the same allegations in this action

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[2] *San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775, 43 LRRM 2838. In *Garmon*, this Court established that the NLRB had exclusive primary jurisdiction over conduct arguably protected or prohibited under Section 7 and Section 8 of the NLRA.

[3] Bingham Toyota, Respondents, and two other charging parties—Michael Holcomb and Robert Posch—eventually settled the unfair labor practice charges before the NLRB. Holcomb and Posch have since dropped their state claims against Petitioners. Accordingly, they are no longer named parties.

in state court.[4] A clearer case of preemption is difficult to imagine. As the Eleventh Circuit recently stated in *Parker v. Conner Steel Company* (11th Cir. 1988) 855 F.2d 1510, 1517, 129 LRRM 2539, 2543-44:

> We believe that the primary jurisdiction rationale has the greatest validity when a party has sought redress for his claims from the NLRB and in the face of an adverse decision the claims are restructured as state law claims and pursued in state court.

Because the NLRB did issue a complaint in this case, preemption is even more compelling here than in *Parker*. Where the Board has already taken jurisdiction over the *conduct* allegedly at issue in the state court proceeding, the preemptive effect of Sections 7 and 8 of the NLRA cannot be doubted. *Cf. International Longshoreman's Association v. Davis* (1986) 476 U.S. 380, 391, 106 S.Ct. 1904, 1912, 90 L.Ed.2d 389, 401, 122 LRRM 2369, 2373 ("if there is preemption under *Garmon*, then state jurisdiction is extinguished"); *Local 926, International Union of Operating Engineers v. Jones* (1983) 460 U.S. 669, 682, 103 S.Ct. 1453, 75 L.Ed.2d 368, 112 LRRM 3272; *Local 1054 v. W.C. Industrial Relations Association* (9th Cir. 1985) 775 F.2d 1042, 1048, 120 LRRM 3097, 3101.

The difficult issue for this Court to resolve, however, is not preemption but rather removal. On this point, a conflict arises between the decision of this Court in *Brown v. Hotel Employees Local 54* (1984) 468 U.S. 491, 104 S.Ct. 3179, 82 L.Ed.2d 373, 116 LRRM 2921, and the decisions of the Ninth Circuit below in this case and in *Ethridge v. Harbor House Restaurant* (1988) 861 F.2d 1389, 130 LRRM 2001.

Although analytically the jurisdictional issue generally precedes all others, the analysis of removal jurisdiction based on federal preemption is an exception. Where the ground for removal is federal preemption, the propriety of removal turns upon the type of preemption involved. If preemption arises solely as a *defense* to the state action, the case may not

[4] Respondents did not bring their blacklisting charge before the NLRB. The District Court, nevertheless, dismissed that action because Respondents could have raised that claim before the NLRB (Appendix B, App. 16).

be removed to federal court. *Franchise Tax Board of the State of California v. Construction Laborers Vac. Trust* (1983) 463 U.S. 1, 13-14, 103 S.Ct. 2841, 2848, 77 L.Ed.2d 420, 433. On the other hand, if the State law claim is *completely preempted,* it "is considered, from its inception, a federal claim, and therefore arises under federal law [and may be removed to federal court]." *Caterpillar Inc. v. Williams* (1987) 482 U.S. 386, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318, 125 LRRM 2521; see also *Metropolitan Life Insurance Company v. Taylor* (1987) 481 U.S. 58, 66-67, 107 S.Ct. 1542, 95 L.Ed.2d 55, 65; *Avco Corp. v. Aero Lodge 735, IAM* (1968) 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126.

Thus, the analysis of removal and preemption are per force interlocked. The propriety of the removal cannot be determined without simultaneously analyzing preemption. If preemption is complete, the case can be removed and must be dismissed with prejudice. If preemption is defensive only, the case must be remanded to state court.[5]

I

RESPONDENTS' STATE ACTION WAS PROPERLY REMOVED TO FEDERAL COURT AND COMPLETELY PREEMPTED BECAUSE THE NLRB HAD ALREADY ASSERTED ITS JURISDICTION TO REGULATE THE CONDUCT ALLEGED AND RELIED UPON BY RESPONDENTS TO SUPPORT THEIR CLAIMS

The error of the Ninth Circuit in this case and in *Ethridge* lies in its conclusion that Sections 7 and 8 of the NLRA do not completely preempt state law. This fundamental defect resulted from the court's confusing analysis and overly narrow interpretation of 28 U.S.C. Sections 1331 and 1441(b).[6]

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[5] Accordingly, although Petitioners have framed two issues for this Court to consider, both will be addressed in the body of one argument.

[6] Section 1331 provides that "[t]he District Court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Section 1441(b) provides for removal jurisdiction on the same basis as Section 1331. Further, 28 U.S.C. Section 1337 grants original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. This also provides a basis for federal jurisdiction in this case. *Cf. Avco Corp. v. Aero Lodge 735, IAM* (1968) 390 U.S. 557, 561-62, 88 S.Ct. 1235, 20 L.Ed.2d 126.

In this case, the Ninth Circuit essentially stated (1) that exclusive NLRB jurisdiction results in complete preemption and (2) that complete preemption results in artful pleading and original federal jurisdiction. *Holcomb v. Bingham Toyota* (9th Cir. 1989) 871 F.2d 109, 110, 131 LRRM 2043, 2044. Then, relying on its previous decision in *Ethridge*, the court below concluded that Sections 7 and 8 of the NLRA did not completely preempt state law, and therefore Respondents' complaint could not be artfully pled and could not provide a basis for federal jurisdiction. *Id.* at 111.

In *Ethridge*, however, the Ninth Circuit's analysis of removal jurisdiction was quite different. *Ethridge* primarily focused on a narrow interpretation of Sections 1331 and 1441. In the context of Sections 7 and 8 of the NLRA, the *Ethridge* court summed up this narrow interpretation as follows:

> [T]here can be no removal jurisdiction unless the plaintiff could have *commenced* the action in federal court. Even if Ethridge had filed his claim for retaliatory discharge in federal court using a complaint expressly relying on Sections 7 and 8 of the NLRA, there would have been no subject matter jurisdiction. Though Sections 7 and 8 may create a federal cause of action, it is not within the federal court's jurisdiction to resolve the dispute—it is for the NLRB to decide the case.
>
> * * *
>
> This is precisely our point—federal district courts have no jurisdiction to decide the merits of a claim within the NLRB's *exclusive* jurisdiction. If these courts have no original jurisdiction, they certainly do not have removal jurisdiction. [Emphasis added]

Ethridge, supra, 861 F.2d 1389, 1400-1401, 130 LRRM 2001, 2010-11.

Obviously, the foregoing language in *Ethridge* is inconsistent with the language the Ninth Circuit employed in the *Bingham* decision:

> If . . . Plaintiff's causes of action are within the *exclusive* jurisdiction of the NLRB, federal law is the source of such claims. The complaint, therefore, would raise a federal question. A state law claim that is completely

> preempted "is considered, from its inception, a federal claim, and therefore arises under federal law." [Citation omitted]

Bingham, supra at 110.

In *Ethridge*, the Ninth Circuit states that removal is not appropriate because the federal action cannot be *commenced* in the federal court because of the *exclusive* jurisdiction of the NLRB. In contrast, in *Bingham*, the Ninth Circuit states that removal would be appropriate if the state action was within the exclusive jurisdiction of the NLRB.

Although this *language* in *Ethridge* and *Bingham* is difficult both to understand and to reconcile, the *results* in these cases indicate the Ninth Circuit's position: original and removal jurisdiction arise only when the *plaintiff* can *commence* a federal action in federal court. *Ethridge, supra* at 1400.

This view is too narrow and conflicts with this Court's decision in *Brown v. Hotel Employees Local 54* (1984) 468 U.S. 491, 104 S.Ct. 3179, 82 L.Ed.2d 373, 116 LRRM 2921. In *Brown*, the union brought an action in the federal district court seeking declaratory and injunctive relief from New Jersey statutory provisions imposing qualification criteria on union officials and prohibiting disqualified officials from collecting union dues. The union alleged that the statutes were preempted under Section 7 of the NLRA because they (1) interfered with the employee's right to select their own representatives and (2) prevented the union from performing its function as the employees' chosen collective bargaining agent. While this Court ruled that there was no preemption on the first issue, it remanded the case to the district court to make findings on the second issue. Thus, this Court implicitly held that the district court had original jurisdiction to determine whether the New Jersey statutes were preempted by Section 7 of the NLRA.

These results in *Brown* cannot be reconciled with the results in *Ethridge* and *Bingham*. Notwithstanding the results, however, some of the principles enunciated below in

Bingham can be reconciled with this Court's decision in *Brown*.

This reconciliation requires a broader interpretation of original federal jurisdiction than permitted by *Ethridge*. Indeed, this Court criticized the *Ethridge* type reasoning when, in *Franchise Tax Board*, it criticized the outdated and narrow jurisdictional test of Justice Holmes: "a suit arises under the law that creates the cause of action." *Franchise Tax Board, supra*, 463 U.S. 1, 8-9 (citing *American Wells Work Co. v. Lane & Buller Co.* (1916) 241 U.S. 257). The Ninth Circuit's conclusion that original jurisdiction exists only where the plantiff can commence an action in federal court merely oversimplifies and paraphrases this outdated test of Holmes.

The broader interpretation of federal jurisdiction is simple: if there is a civil action arising under the laws of the United States, the federal district courts will have jurisdiction. 28 U.S.C. § 1331. The NLRA under Sections 7 and 8 provided such a federal action to Respondents.

Although generally, for purposes of removal, the federal action must appear on the face of the complaint, jurisdiction is determined on the basis of a "well pleaded" complaint. *Olguin v. Inspiration Console Copper Co.* (9th Cir. 1984) 740 F.2d 1468, 1472, 117 LRRM 2073. Thus, "a plantiff may not . . . avoid federal jurisdiction simply . . . by casting in state law terms a claim that can be made only under federal law. . . . [A] complaint that is 'artfully pleaded' to avoid federal jurisdiction may be recharacterized as one arising under federal law." *Id.* at 1472 (citing *Franchise Tax Board, supra* at 2853.)

Under the artful pleading doctrine, the District Court was entitled to consider the Regional Director's NLRB compliant (Appendix D). By comparing the state and NLRB complaints, the District Court correctly ascertained that Respondents had a civil action arising under federal law. They pursued this civil action by filing charges with the NLRB. Further, the NLRB took jurisdiction over their action. Given these facts, the District Court held that the action was properly removed

and preempted by the exclusive jurisdiction of the NLRB (Appendices B and C).

This exclusive federal civil action provided to Respondents under the NLRA naturally provides as a *quid pro quo* to Petitioners a right to remove Respondents' state court action in order to obtain a prompt dismissal. The exclusive federal remedy under the NLRA does "displace entirely" the state action. *Cf. Franchise Tax Board, supra* at 23 (citing *Avco v. Aero Lodge 735, IAM* (1968) 390 U.S. 557, 560, 88 S.Ct. 1235, 20 L.Ed.2d 126).

In the case below and in *Ethridge*, the Ninth Circuit strayed when it concluded that Sections 7 and 8 of the NLRA do not completely preempt state law. These provisions of the NLRA do preempt state law completely because they provide Respondents with a federal remedy which Congress intended to be exclusive.

Thus, in this case, some of the legal premises of the Ninth Circuit were correct but nevertheless led to an incorrect result. Actions within the exclusive jurisdiction of the NLRB *do* arise under federal law. Actions arising under federal law are completely preempted. The preemption is not merely defensive. If, by the artful pleading doctrine, a federal civil action is disclosed by reference to the plaintiff's complaint and the petition for removal, the plaintiff's action will be subject to removal and will be completely preempted.

This federal civil action and remedy under the NLRA are not unlike civil actions and remedies provided by Section 301 of the Labor Management Relations Act ("LMRA") and Section 502 of the Employee Retirement Income Security Act ("ERISA"). Both of these statutory provisions create complete preemption. *Avco v. Aero Lodge 735, IAM* (1968) 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126; *Metropolitan Life Insurance Co. v. Taylor* (1987) 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d. 55, 8 E.B.C. 1417. Like Sections 7 and 8 of the NLRA, these other statutory provisions are intended to regulate specific conduct related to labor-management relations that Congress intended to be subject to a uniform national law. Also like these provisions, Section 7 and Section

8 of the NLRA provide different remedies than those available in state court. As this Court has ruled, however, such a difference in remedies "only accentuates the danger of conflict [between federal and state law]." *Garmon, supra,* 359 U.S. at 247.

The only difference between Section 7 and Section 8 preemption on the one hand, and Section 301 and Section 502 preemption on the other, is that the latter provisions permit the plaintiff to commence the federal civil action directly in federal court. The former provisions require the plaintiff to proceed first before the NLRB. As explained above, this difference is too narrow to be significant and was implicitly rejected in *Brown.* It should not be a ground for federal courts to decline removal jurisdiction.

At a minimum, *Brown* must stand for the proposition that the defendant in the state action can seek a federal injunction to keep the state action from proceeding and that the federal court has jurisdiction to issue the injunction if there is NLRA preemption. If the defendant can accomplish a swift resolution to the preemption issue by separate federal action, there is no good reason to preclude the same result by removal. If there is original jurisdiction for the injunction, there must be removal jurisdiction to obtain the same result.

As a practical matter, there is nothing to be gained and much to be lost by permitting the decision below to stand. First, assuming *arguendo* this Court agreed with the Ninth Circuit that the preemption in this case is merely defensive, then it should reconcile its holding in *Brown* and educate counsel to refrain from removing cases such as this to federal court. Certainly the denial of this petition will not discourage other defendants from removing state actions that are preempted by Sections 7 and 8 of the NLRA.

Second, and much more important, this Court should clarify that defendants *can remove* state claims that are clearly and completely preempted by Section 7 and Section 8 of the NLRA. This is not a case where the Respondents had only a *theoretical* claim under Section 7 and Section 8, or the Board had only *arguable* jurisdiction. Rather, this is a

compelling case for complete preemption of state regulation. The Regional Director did not bring the charges *sua sponte*. Where the NLRB has already asserted jurisdiction, the state court should not interfere, and the federal court should be the guardian against such interference. *Brown* clearly authorizes and approves this guardianship role.

As the Ninth Circuit correctly recognized in *Local 1054 v. W. C. Industrial Relations Association* (9th Cir. 1985) 775 F.2d 1042, 1049, 120 LRRM 3097, 3101:

> The Supreme Court stated in *Jones*[7] that if the conduct relied on to prove a crucial element in the state action is conduct that is arguably covered by the NLRA, then the state claim is preempted.

The critical point is that the conduct that the state attempts to regulate in this case is the same conduct that is already subject to the jurisdiction and regulation of the NLRB. The state cannot again tread upon this ground. The rationale is well known: Congress intended the NLRB to establish uniform regulation of the relationship between labor and management. Congress designated the NLRB as the principal government forum to set labor policy in the United States. Congress intended that labor policy to remain uniform. If Respondents are allowed to bring their state causes of action, the interference with the NLRB's role in setting labor policy would be intolerable. If the federal courts are not available to preserve the exclusive jurisdiction of the NLRB, the issue of the protection of the NLRB's primary jurisdiction will be on a state-by-state and case-by-case basis. Uniformity of national labor policy will be destroyed.

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[7] *International Union of Operating Engineers v. Jones* (1983) 460 U.S. 669, 682, 103 S.Ct. 1453, 75 L.Ed. 368, 112 LRRM 3272.

CONCLUSION

The decision below is clearly at odds with this Court's decision in *Brown*. Allowing this decision to stand without guidance from this Court will inevitably foster pointless litigation, inefficient judicial procedure, and fragmented and disparate labor policies throughout our nation. The assertion of jurisdiction by the National Labor Relations Board over the conduct at issue in the state action presents a compelling case not only for preemption but for removal as well. Under Section 7 and Section 8 of the NLRA, the Congress has given Respondents a federal action over which the NLRA has exclusive jurisdiction. The national labor policies of Congress embodied in the NLRA were intended to balance the equities between labor and management, reduce industrial tension and strife, and bring about industrial peace. By granting this petition and reversing the Court of Appeals, this Court will carry out its constitutional mandate by restoring to a national forum the national labor policy intended to promote the welfare and harmony of management and labor alike.

Respectfully submitted,

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Attorneys for Petitioner

July 3, 1989

APPENDIX A

Opinion and Judgment of the U.S. Court of Appeals for the Ninth Circuit

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 88-1752

MICHAEL HOLCOMB, DAVID GROWDON, RICHARD VIZZOLINI, BOB POSCH,

Plaintiff/Appellees,

v.

BINGHAM TOYOTA, a California corporation, BYRUM BINGHAM, CRAIG TUCKER, DOES I through X, inclusive,

Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Robert E. Coyle, District Judge, Presiding

Argued and Submitted: February 15, 1989

Filed: April 3, 1989

Before: Herbert Y.C. Choy, Joseph T. Sneed and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Sneed

OPINION

SNEED, Circuit Judge:

Plaintiffs appeal from the district court's order granting Defendants' removal petition and dismissing their complaint on the ground that it was preempted by § 7 and § 8 of the National Labor Relations Act (NLRA). See 29 U.S.C. §§ 157, 158 (1982). We reverse and remand and direct that this case be remanded to the state court from which it was removed to the district court.

I

FACTS AND PROCEEDINGS BELOW

Appellants Holcomb, Vizzolini, and Growdon were employed by Bingham Toyota as salesmen. They were fired after they refused to contribute money to buy Byrum Bingham, the owner of a dealership, a Christmas present. There are also allegations that Bingham retaliated against employees who refused to contribute by removing certain fringe benefits such as the use of demonstration vehicles and sales incentives. Initially, only Holcomb was discharged; however, Vizzolini and Growdon were also discharged for protesting Holcomb's firing. The salesmen filed a complaint with the National Labor Relations Board (NLRB) charging that Bingham Toyota committed an unfair labor practice by firing them for engaging in concerted activity in violation of § 7 and § 8 of the NLRA. See 29 U.S.C. §§ 157-158 (1982). The NLRB found evidence to support Plaintiffs' claims and issued a complaint. This action was later settled by the parties.

Plaintiffs, not satisfied, filed this action in California state court alleging five causes of action. The first and second counts alleged that Plaintiffs were wrongfully discharged. The third cause of action alleged breach of employment contracts. The fourth and fifth causes of action alleged the violation of two state statutes, Cal. Labor Code § 1054 (West 1971) and Cal. Bus. & Prof. Code § 17200 (West 1987), respectively. Bingham removed the case to federal court and moved to

dismiss the complaint on the ground that the plaintiffs' claims were preempted by the NLRA. The district court concluded that all Plaintiffs' causes of action were preempted and dismissed the complaint.

II

JURISDICTION

Jurisdiction is the issue raised by this appeal. The district court removed the case pursuant to 28 U.S.C. § 1441(b) (1982). This court has jurisdiction to determine jurisdiction under § 1292.

III

STANDARD OF REVIEW

This court reviews the district court's decision to grant a petition for removal de novo. See *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 930 (9th Cir. 1986), aff'd, 482 U.S. 386 (1988). The party invoking the removal statute has the burden of establishing federal jurisdiction. *Id.*

IV

REMOVAL

[1] Defendants claim that Plaintiffs' causes of action arise under federal law and are therefore removable under 28 U.S.C. § 1441(b). As a general proposition, the federal question must appear from the face of the plaintiff's complaint. A defendant may not remove a case on the basis of a federal defense, including preemption. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 14 (1983). It is undisputed that the plaintiffs' complaint in this case does not, on its face, raise a federal question. However, there is a corollary to the well-pleaded complaint rule. Under the artful pleading doctrine, "federal courts may take jurisdic-

tion over a complaint removed from state court where the plaintiff, although framing his action under state law, in actuality raises an essential federal question." *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 931 (9th Cir. 1986), aff'd, 482 U.S. 386 (1987). This exception permits a court "to investigate the true nature of the plaintiff's affirmative allegations, often looking to the petition for removal to clarify the action presented . . . ." *Id.* at 931 n. 1; see 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3722, at 266-75 (1985).

[2] If, as Defendants claim, Plaintiffs' causes of action are within the exclusive jurisdiction of the NLRB, federal law is the source of such claims. The complaint, therefore, would raise a federal question. A state law claim that is completely preempted "is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar Inc. v. Williams*, 107 S.Ct. 2425, 2430 (1987); see *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66-67 (1987). Thus, in order to find that the complaint in this case was artfully pleaded, we must find that § 7 and § 8 of the NLRA completely preempt state law.

In *Williams*, the defendants argued that the plaintiffs' claims were preempted by the Labor Management Relations Act. In a footnote, however, we theorized that § 7 and § 8 of the NLRA might completely preempt state law. See *Williams*, 786 F.2d at 934 n. 3. The district court relied on this footnote and held that § 7 and § 8 of the NLRA completely preempted the plaintiffs' causes of action. As a result, the court concluded that the plaintiffs' causes of action were removable.

[3] In an intervening decision, this court, acknowledging instructions received from the Supreme Court in *Caterpillar*, rejected footnote three in *Williams* and held that § 7 and § 8 of the NLRA do not completely preempt state law and therefore a defendant asserting preemption under these sections cannot remove a case to federal court. See *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1397-98 (9th Cir. 1988).

Because these statutes do not completely preempt state law, we must hold that the plaintiffs' complaint is not artfully pled. Plaintiffs have not raised a federal question on the face of their complaint nor is a federal cause of action "concealed" by artful pleading. The state courts are fully able to determine whether the plaintiffs' claims are preempted. The district court erred in denying the plaintiffs' motion to remand.

REVERSED and REMANDED.

APPENDIX B

United States District Court

EASTERN DISTRICT OF CALIFORNIA

No. CV-F-87-202 REC

MICHAEL HOLCOMB, *et al.*,

Plaintiffs,

v.

BINGHAM TOYOTA, INCORPORATED, *et al.*,

Defendants.

DECISION AND ORDER RE MOTION FOR RECONSIDERATION

On October 5, 1987, the court heard defendants' Motion for Reconsideration. Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants defendants' motion for the reasons set forth herein.

In its Decision and Orders filed July 30, 1987, the court denied defendants' Motion to Dismiss and/or For Summary Judgment to the extent defendants argued that the Fourth Cause of Action is preempted by the NLRA, and is under the exclusive jurisdiction of the NLRB. The Fourth Cause of Action in plaintiff's complaint, which complaint was removed to this court, alleges on information and belief in pertinent part:

> [Defendants] have misrepresented to prospective employers of the plaintiffs the terms, conditions and manner of performance by the plaintiffs of their employment with defendants. Such misrepresentations have prevented, or were attempts to prevent, and may in the future prevent the plaintiffs from obtaining employment suitable to their skills, experience and qualifications.

The Fourth Cause of Action further alleges that the acts of defendants are violations of the California Labor Code.

In denying this portion of defendants' motion, the court ruled:

> The court concludes, however, that the fourth cause of action is not preempted. The court cannot fathom how the alleged actions by defendants occurring after plaintiffs were terminated has any relevance to the policies of the NLRA. At oral argument, defendants stated that the Ninth Circuit in *Local 1054, supra* held preempted a state law claim for interference with prospective economic advantage. The court does not read *Local 1054* as controlling the issue before the court with respect to the fourth cause of action. In *Local 1054, supra* at 1047-1049, the Ninth Circuit held to be preempted the union's state law claim against labor consultants for tortious interference with a prospective contractual relationship, i.e., the collective bargaining relationship.

The court further ruled: "The court having determined that all causes of action except the fourth cause of action are preempted by the NLRA and within the exclusive jurisdiction of the NLRB, the court dismisses the first, second, third and fifth causes of action. The fourth cause of action is remanded to state court, this court having no jurisdiction to hear it." Judgment was entered on July 31, 1987. On August 5, defendants filed their Motion for Reconsideration, arguing that the fourth cause of action is preempted by Section 8(a)(4) of the NLRA which provides that it is an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony with the NLRB. In so moving, defendants state:

> Defendants acknowledge this specific concern of the Court was not previously fully briefed by the parties. However, there is ample authority under the decisions of the NLRB to establish that retaliatory acts against terminated employees are to be remedied by proceedings before the NLRB. Defendants wish to bring this authority to the attention of the Court. Accordingly, this Motion for Reconsideration sets forth the applicable legal authority the Court found lacking in the parties' previous briefs and will establish that Plaintiffs' Fourth Cause of Action is clearly preempted and should also be dismissed.

This motion is governed by the standards developed for disposition of motions to alter or amend the judgment pursuant to Rule 59(e). Disposition of the motion is within the discretion of the district court. In ruling on the motion, however, "[t]here is a significant difference between pointing out errors in a court's decision on grounds that have already been urged before the court and raising altogether new arguments on a motion to amend; if accepted, the latter essentially affords a litigant 'two bites at the apple.' " *American Home Assurance Co. v. Glenn Estess & Associates, Inc.*, 763 F.2d 1237, 1239 (llth Cir. 1985).

Plaintiffs argue that the motion should be denied because defendants are attempting to obtain a "second bite at the apple":

> In the instant matter, Defendants are simply submitting new arguments, after thoughts [sic] if you will, in support of their previous claims that all of Plaintiffs' causes of action are preempted under the NLRA. Defendants did not assert, in any of their previously filed papers, that Plaintiffs' Fourth Cause of Action was preempted under Section 8(a)(4) of the Act, a slightly different twist to arguments made as to the other four, even though Defendants had every opportunity to do so. Despite the different twist, Defendants offer *no* new legal basis for dismissal. Defendants continue to argue that Plaintiffs' Fourth Cause of Action is preempted under federal labor law and thus falls within the exclusive jurisdiction of the NLRB. This is the very same argument made previously and fully considered by the Court in rendering final judgment in this matter.

The court is not unsympathetic to plaintiffs' argument, especially given the assertion in defendants' reply brief that their reliance upon Section 8(a)(4) is intended as an example and that preemption is appropriate under Section 8(a)(1). Nonetheless, the court will reconsider its ruling because the underlying argument is one of this court's subject matter jurisdiction.

In their opening brief, defendants argue that the plain language of Section 8(a)(4) making it an unfair labor practice "to discharge or otherwise discriminate against an employee

because he has filed charges or given testimony under this subchapter . . ." clearly governs the allegations of the fourth cause of action and further argue that paragraphs 5(b), 6, 7 and 8 of the complaint issued by the NLRB "expressly contemplates redressing this alleged activity."

While plaintiffs concede that Section 8(a)(4) makes it an unfair labor practice for an employer to discriminate against terminated employees by retaliatory post-discharge conduct and that the NLRB has repeatedly found violations where post-discharge conduct is in retaliation for employee involvement in Board proceedings, they correctly note that post-discharge conduct falls within the scope of Section 8(a)(4) only if it is motivated by a desire to retaliate against an employee's involvement in Board proceedings, motivation neither alleged in the complaint before the court nor the unfair labor practice complaint issued by the NLRB.

The court agrees with plaintiffs that a violation of Section 8(a)(4) is not involved in the NLRB complaint and that, therefore, its redress is not expressly contemplated therein. Thus, with respect to the fourth cause of action, the court is not faced with the circumstance where the Board had already assumed jurisdiction over the unfair labor practice charges as was the case with the other causes of action.

There is, however, no question that the Board would have jurisdiction to decide whether an employer's post-discharge conduct is in violation of Section 8(a)(4). The question is whether the Board in the first instance must make that determination, i.e., whether the activity relied on as the basis for the suit is arguably subject to Section 8(a)(4) of the NLRA. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 243-245 (1959). Defendants assert that this cause of action is preempted because:

> [T]he focus of the NLRB inquiry on Defendants' post-termination conduct would be identical to that in the state proceeding. Each proceeding would be attempting to determine, as a factual matter, whether or not Bingham Toyota and its agents did make representations to prospective employers of Plaintiffs. Both the state court claims and the NLRB claims are intended to address the

> same alleged wrongs: (1) the wrong done to the discharged employees, and (2) the wrong done to the remaining employees. In other words, the policy behind both laws is to protect all employees from retaliatory actions. Since both the focus and the conduct would be identical in both proceedings, Plaintiffs' Fourth Cause of Action is preempted and should be dismissed.

Plaintiffs respond that preemption does not apply:

> The state cause of action brought under California Labor Code Section 1050 and 1054, is not analogous to the federal remedy created by Section 8(a)(4) of the NLRA, nor is the Labor Code a substitute for the federal remedy. The two center on distinct and separate types of conduct, address distinct and different public policies and require proof of different elements. The federal statute is directed towards retaliatory conduct and intended to preserve the integrity of the Board process. . . . The state statute on the other hand is intended to prohibit the intentional dissemination of false information to prospective employers. . . . Contrary to Defendants' assertion, the focus of the NLRB inquiry in actions alleging a violation of Section 8(a)(4), and in this action were it before the Board, is *not* whether Defendants and their agents made the alleged misrepresentations to prospective employers, but whether the misrepresentations were *motivated* by a desire to retaliate against Plaintiffs for their prior involvement in Board proceedings. . . .
>
> Plaintiffs' Fourth Cause of Action does not require the resolution of any substantial question of federal law and is a valid claim for relief under state law without any reference to a federal issue. It is thus *not* preempted under current law.

In their reply brief, defendants acknowledge that, as a general rule, post-discharge conduct falls within the scope of Section 8(a)(4) only if it is motivated by a desire to retaliate against an employee's involvement in Board proceedings. Defendants then state that they are not relying upon Section 8(a)(4) as the basis for preemption:

> Although defendants have attempted to demonstrate that Plaintiffs' *allegations* provide the basis for a Section 8(a)(4) violation, that attempt was primarily to establish by way of example that, as a matter of law, such post-discharge conduct is subject to the Board's jurisdiction.

> Notwithstanding Defendants' demonstration, Defendants' principal position has always been that Plaintiffs' Fourth Cause of Action is preempted because it is subject to the jurisdiction of the Board under both Section 7 and Section 8, and not just Section 8(a)(4).

Since nothing in defendants' opening brief even suggests that Section 8(a)(4) was intended as an example, the court was somewhat taken aback by defendants' subsequent disclaimer. In any event, defendants now argue that a violation of Section 8(a) only needs a retaliatory motive for an employee's engaging in *any* protected activity, not just involvement in Board proceedings. More importantly, defendants also contend that "it is well-established that an employer's motive is not an essential element of a Section 8(a)(1) violation," Section 8(a)(1) making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 157 of this title. . . ."

The court's research indicates, however, that the unimportance of the employer's motivation in a Section 8(a)(1) violation context is not so clearly established as defendants assert. *See* Morris, 1 *The Developing Labor Law*, pp. 76-78 (2d Ed. 1983). Although *Fun Striders, Inc. v. NLRB*, 686 F.2d 659, 661-662 (9th Cir. 1981), holds that, while relevant, motive is not an essential element of a Section 8(a)(1) which is not derived from a violation of Sections 8(a)(2)-(5), improper motive is an element in a Section 8(a)(1) action derived from Section 8(a)(4). *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983); *see also International Longshoremen's v. Pacific Maritime Ass'n*, 773 F.2d 1012 (9th Cir. 1985), *cert. denied*, ____ U.S. ____, 90 L.Ed.2d 720 (1986). Nonetheless, the court concludes that because the Fourth Cause of Action can be construed as stating a Section 8(a)(1) violation, the fact that the Fourth Cause of Action does not allege a retaliatory motive is not determinative of whether this cause of action is preempted and within the exclusive jurisdiction of the NLRB.

Defendants further cite *Lumber Production Industrial Workers Local #1054 v. West Coast Industrial Relations*

Association, Inc., 775 F.2d 1042, 1048 ((th Cir. 1986) [sic], wherein the Ninth Circuit interpreted *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669 (1983) "as standing for the proposition that if a crucial element of a state court action is identical to an element of an unfair labor practice that is arguably covered by the NLRA, then the state action is preempted." Defendants then argue that the allegations of misrepresentation and attempt to prevent employment are crucial to plaintiffs' fourth cause of action as they are to a Section 8(a)(4) unfair labor practice charge and thus are preempted pursuant to *Local #1054*, a proposition with which the court agrees.

Defendants argue that Labor Code Sections 1050 and 1054 are "nothing more than anti-blacklisting statutes" which a California court has already ruled are preempted by the NLRA. *Elsis v. Evans*, 185 Cal.App.2d 610, 613-614 (1960). However, as noted in *Breitegger v. Columbia Broadcasting System, Inc.*, 43 Cal.App.3d 283, 293 (1974), *Elsis* was decided prior to *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966), a case upon which plaintiffs rely in arguing that the fourth cause of action is not preempted.

Plaintiffs contend that the fourth cause of action is analogous to the state cause of action for libel, the libel allegedly occurring during a union organizing campaign, which cause of action was held not to be preempted in *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966). *See also Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (cause of action for misrepresentation and breach of contract by replacement employees against employer not preempted). Relying upon *Linn*, plaintiffs argue:

> As discussed above, the focus of the Board's inquiry, had an 8(a)(4) violation been asserted, would have to be on whether the required retaliatory and coercive motive is present. The state court's focus on the other hand must be on whether the elements of a [sic] Labor Code Sections 1050 and 1054 are present, *i.e.* were the statements false and made with knowledge of their falsity. The focus of the state cause of action will thus *not* impinge upon the NLRB's function nor interfere with national labor policy.

> Furthermore, it would further a state policy of significant local concern and interest. Under the holding of *Linn*, Plaintiffs' Fourth Cause of Action is simply *not* preempted.

However, in *Breitegger, supra,* at 292-293, the California Court of Appeal held:

> In the instant case the complaint alleges that false representations as to the reason for termination of appellant's prior employment were made by the defendants with knowledge of their falsity, with the intent to prevent appellant from obtaining employment and that said misrepresentations in fact prevented appellant from obtaining employment, to his damage. These allegations appear to come within the *Linn* exception to the exclusive jurisdiction of the NLRB.
>
> The instant complaint does not specifically allege defamation but rather 'misrepresentation under Labor Code sections 1050, 1054' and 'wrongful intereference in contract and advantageous business relations. Respondents rely upon *Elsis v. Evans,* . . . for the proposition that a violation of Labor Code section 1050 which also constitutes an unfair labor practice is within the exclusive jurisdiction of the NLRB. However, *Elsis v. Evans* was decided prior to *Linn.* A complaint under Labor Code section 1050 which actually alleges that the statements in question were made with knowledge of their falsity or reckless disregard of the truth falls within the *Linn* exception. For the guidance of the parties on remand we note, however, that the terms of section 1050 refer only to misrepresentations by the former employer.

Defendant contends that plaintiffs may not rely upon *Linn* or *Breitegger:*

> [The] Fourth Cause of Action does not allege that Defendants made the alleged misrepresentations with knowledge of their falsity or reckless disregard of whether they were true or false or even what misrepresentations were actually allegedly made. Why should this court assume that the state court will focus upon an issue that Plaintiff has [sic] not raised in the pleadings?

As the fourth cause of action now stands, defendants' argument concerning the state of the pleadings is correct and the *Linn* exception to preemption does not apply.[1]

Plaintiffs' final argument in opposition to this motion is that defendants cannot use the artful pleading doctrine to change the character of the fourth cause of action. Plaintiffs contend:

> The artful pleading doctrine is never invoked to create new factual allegations where none existed before or to impose a new burden of proof. The doctrine is invoked only to recharacterize a purported state cause of action when the factual allegations in the complaint support a federal claim.

Defendants respond:

> The Plaintiffs raise the 'Artful Pleading Doctrine' at the end of their Opposition Brief for the proposition that the Fourth Cause of Action is not preempted. However, the Artful Pleading Doctrine is applicable to the issue of removal jurisdiction, not the issue of preemption. Therefore, Plaintiffs' argument is of no avail.
>
> In its Decision on July 30, 1987, this Court ruled that it had jurisdiction to determine whether Plaintiffs' Fourth Cause of Action was preempted by the National Labor Relations Act. The Court ruled that the Fourth Cause of Action was not preempted and, on that basis, remanded the cause of action to state court. By raising the Artful Pleading Doctrine at this juncture, Plaintiffs must now attempt to relitigate the issue of removal in this Motion for Reconsideration However, if Plaintiffs had wished to relitigate the issue of removal jurisdiction, they should have moved for reconsideration on that issue within the statutory ten day limit. Since they failed to do so, they should not be allowed to raise the issue at this juncture.

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[1] As an alternative to dismissal of the entire complaint with prejudice, defendants state: "[T]he court should find that the current Fourth Cause of Action is pre-empted but allow Plaintiffs leave to amend if they desire to amend the complaint to state a cause of action for libel or slander with [sic] the *Linn* exception." Plaintiffs, however, have made no suggestion that they can or wish to do so.

The court does not fully agree with defendants' position. Preemption in this action only came up because of the removal. This court previously held:

> This court must assume jurisdiction for the limited purpose of determining whether exclusive federal jurisdiction over some or all of plaintiffs' causes of action exists in the NLRB. Accordingly, the court denies plaintiffs' Counter Motion for Remand to the extent that plaintiffs contend that this court may not determine whether their causes of action are preempted by the NLRA and within the exclusive jurisdiction of the NLRB.

It is interesting to note, moreover, that defendants impliedly concede that their initial reliance upon Section 8(a)(4) for preemption would be an improper use of the artful pleading doctrine given their argument:

> Furthermore, as Defendants have clearly established, it is not necessary to rewrite Plaintiffs' Fourth Cause of Action to demonstrate that it is preempted by the NLRA. Plaintiffs' Fourth Cause of Action clearly states an unfair labor practice charge for blacklisting and does not allege the elements of common law libel, slander or fraud. Retaliatory motive is not essential for finding such a violation under Section 8(a)(1). Hence, Plaintiffs' Artful Pleading Doctrine argument is utterly without merit.

Because, however, the court has held that a violation of Section 8(a)(1) does not require retaliatory motive, the court concours [sic] with defendants that plaintiffs' argument is without merit.[2]

ACCORDINGLY, IT IS ORDERED that defendants' Motion for Reconsideration is granted. IT IS FURTHER ORDERED that the Judgment in Civil Case entered July 31, 1987 is vacated, the Clerk to enter the following judgment:

> The court denies plaintiffs counter motion for remand to the extent that plaintiffs contend that this court may

[2] The court does not find *Vincent v. Trend Western Technical Corp.*, 828 F.2d 563 (9th Cir. 1987), cited by plaintiffs, helpful to their position. As defendants asserted at oral argument, here, in distinction to *Vincent*, working conditions are involved and the NLRA implicated because of Section 8(a)(1).

not determine whether their causes of action are preempted by the NLRA and within the exclusive jurisdiction of the NLRB.

The causes of action in plaintiffs complaint being within the exclusive jurisdiction of the NLRB, this action is dismissed

DATED: January 5, 1988.

/s/
Robert E. Coyle
United States District Judge

APPENDIX C

United States District Court

EASTERN DISTRICT OF CALIFORNIA

No. CV-F-87-202 REC

MICHAEL HOLCOMB, *et al.*,

Plaintiffs,

v.

BINGHAM TOYOTA, INCORPORATED, *et al.*,

Defendants.

DECISION AND ORDERS

On June 8, 1987, the court heard defendants' Motion to Dismiss and/or For Summary Judgment and plaintiffs' Counter Motion for Remand. Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants in part and denies in part plaintiffs' Counter Motion for Remand and grants in part and denies in part defendants' Motion to Dismiss and/or For Summary Judgment.

On March 17, 1987, plaintiffs Michael Holcomb, Richard Vizzolini, David Growdon and Robert Posch filed a Complaint for Damages (Wrongful Discharge) against Bingham Toyota, Inc., Byrum Bingham and Craig Tucker in the Fresno County Superior Court. Plaintiffs' complaint alleges in its introductory portion:

> 1. This is an action brought by four persons formerly employed by the defendants as salespersons. The plaintiffs assert that they were wrongfully discharged from their employment in retaliation for their refusal to give up a portion of their wages as a kickback to the defendants, an amount which the defendants claimed would be used to purchase a 'Christmas gift' for defendant Byrum Bingham. The discharge of these defendants was in violation of the public policy of California. The

plaintiffs assert also that the defendants have by means of misrepresentation, interfered with plaintiffs' efforts at reemployment in violation of California law.

Paragraphs 33 and 34 of the complaint allege:

> 33. Shortly after Mr. Vizzolini and Mr. Growdon were fired, defendant Tucker informed Mr. Posch that a complaint had been made to a governmental agency about their discharge. On numerous occasions thereafter, defendants made it known to me that they expected me not to be truthful to any investigator of such an agency, concerning the fact that the three salesmen were fired for not paying the annual amounts demanded of them by defendants. Defendants offered Mr. Posch incentives for not being truthful in any ensuing investigation, including opportunities to drive expensive cars. Defendants instructed Mr. Posch that his continued employment was contingent upon his not talking with other salespersons about the true reasons for the discharge of Mr. Holcomb, Mr. Vizzolini and Mr. Growdon. Defendants regularly confronted Mr. Posch with the contention that his refusal to cooperate with them constituted a 'bad attitude' and that he should 'quit' so that he could join the three that were discharged.
>
> 34. Mr. Posch, as a direct result of defendants' actions, suffered anxiety, worry, depression, loss of appetite, and nausea, and a consequent inability to continue to be a successful salesman, all of which amounted to a constructive discharge causing Mr. Posch to cease employment with the defendants on or about March 3, 1987.

Following detailed factual allegations concerning the parties and their respective actions, the complaint alleges causes of action for wrongful discharge in violation of California public policy, wrongful discharge in violation of the implied covenant of good faith and fair dealing, wrongful discharge for breach of contract, misrepresentation to prospective employers of plaintiffs in violation of the California Labor Code and unfair and unlawful business practice within the meaning of California Business and Professions Code § 17200. On April 9, 1987, the action was removed to this court. As grounds for removal, defendants' petition alleged that unfair labor practice charges had been filed by plaintiffs Holcomb, Growdon and Vizzolini with the National Labor Relations Board

in February, 1987 and attached a copy of the consolidated unfair labor practice complaint issued by the NLRB on March 18, 1987, which unfair labor practice complaint alleges that Bingham Toyota engaged in certain specifically described conduct including the discharge of and failure to reinstate to their former positions of employment Holcomb, Growdon and Vizzolini "because of, and/or concerning, its employees' actual or perceived engagement in protected concerted activities, including but not limited to concertedly questioning and/or protesting Respondent's 'request' for contributions toward a Christmas gift for B. C. Bingham." The Petition for Removal alleges:

> . . . . . Pursuant to the National Labor Relations Act, the National Labor Relations Board has jurisdiction to resolve disputes concerning unfair labor practices by an employer against the concerted actions of its employees protected by Section 7 of the National Labor Relations Act. Also pursuant to the National Labor Relations Act, the Federal District Courts and Courts of Appeal have jurisdiction to enforce the Orders of the Board. The Plaintiffs' causes of action for wrongful discharge, violation of statute, and unfair and unlawful business practices also assert breaches of the employer's obligations under the National Labor Relations Act. Accordingly, these causes of action raise a federal question, and this Court has original jurisdiction over the matter pursuant to 28 U.S.C. section 1331.
>
> IX
>
> Plaintiff Robert Posch has not yet filed his charges with the National Labor Relations Board, but the gravamen of his claims are unfair labor practices directly related to the allegations of Plaintiffs Holcomb, Growdon and Vizzolini in their complaints before the National Labor Relations Board. Pursuant to the National Labor Relations Act, the National Labor Relations Board has jurisdiction to resolve disputes concerning unfair labor practices by an employer against a concerted action of its employees protected by Section 7 of the National Labor Relations Act though [sic] Section 8(a)(4) of the Act (29 U.S.C. § 158(a)(4)). The Federal District Courts and Courts of Appeal have jurisdiction to enforce orders of the Board. Plaintiff Posch's causes of action for wrongful discharge, violation of statute, and unfair and unlawful

> business practices assert breaches of the employer's obligations under the National Labor Relations Act. Accordingly, these causes of action raise a federal question, and this Court has original jurisdiction over the matter pursuant to 28 U.S.C. section 1331.

A. Counter Motion to Remand

Plaintiffs move to remand this case on the ground that no federal jurisdiction existed under the removal statute.

This motion raises the question of when and how removal jurisdiction may be based on federal preemption. The Ninth Circuit recently addressed this issue in *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928 (9th Cir.), *cert. granted,* ____ U.S. ____, 93 L.Ed.2d 401 (1986), a case involving removal jurisdiction based on Section 301 preemption. In *Williams,* the Ninth Circuit set forth what it considers to be the appropriate analysis for determining removal on the ground that state law causes of action are preempted by Section 301. *Id.* at 930-933. The Ninth Circuit then proceeded to reconcile its previous precedent with the approach outlined in *Williams, Id.* at 933-935. In discussing *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied,* 471 U.S. 1099 (1986) and *Aragon v. Federated Department Stores, Inc.*, 750 F.2d 1447 (9th Cir.), *cert. denied,* ____ U.S. ____, 88 L.Ed.2d 229 (1985), ____ U.S. ____, 88 L.Ed.2d 768 (1986), the Ninth Circuit commented at 934, 934 n.3:

> However, it is important to note that neither *Aragon* nor *Garibaldi* cited *Franchise Tax Board* or commented on the Supreme Court's requirement that initial removal jurisdiction be proven before addressing the merits of the preemption allegation. Neither decision expressly considered whether the preemption issue was properly before the court.[3]

[3] Perhaps even more significantly, both decisions analyzed the preemption claims through references to preemption law under the National Labor Relations Act (NLRA). The NLRA may constitute a fairly unique area of law where, at least in some cases, the determination of federal jurisdiction in the National Labor Relations Board (NLRB) employs the identical analysis required to determine whether a state law claim is preempted. *See Sears, Roebuck & Co. v. San Diego Council of Carpenters,* 436 U.S. 180, 197 (1978). If the activity underlying a state law claim is "arguably subject" to regulation under sections 7 and 8 of the NLRA, 29 U.S.C.

Defendants urge the court to follow the dicta in footnote 3 in *Williams* and deny this motion to remand by holding that this court has jurisdiction to determine whether exclusive federal jurisdiction exists in the NLRB. In so arguing, defendants further refer the court to *Lumber Production Industrial Workers Local #1054 v. West Coast Industrial Relations Association, Inc.*, 775 F.2d 1042 (9th Cir. 1986) cited in footnote 3 of *Williams*. In *Local #1054*, the Ninth Circuit held that the district court erred in assuming jurisdiction over the union's claim under Section 301(a). *Id.* at 1045-1047. However, the Ninth Circuit went on to hold that the conduct involved in the union's state law claim was within the exclusive jurisdiction of the NLRB and therefore was preempted. The Ninth Circuit remanded the case for dismissal. *Id.* at 1047-1049. There is no discussion in *Local #1054* of removal jurisdiction based on preemption as there was in *Williams* and other cases. Nonetheless, defendants urge the court to follow its rationale of combining the exclusive jurisdiction analysis with the preemption analysis.

Plaintiffs, noting the conditional language in footnote 3 of *Williams* and pointing out that footnote 3 is dicta, argue "The very recent dictates of the Supreme Court in *Franchise Tax Board* make it clear that analysis of the removal itself is required first; absent a federally-created cause of action or relief dependent upon a substantial question of federal law, this court has no original jurisdiction."

While the guidance from the Ninth Circuit is not very clear, the court feels constrained to conclude from footnote

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§§ 157, 158, the action is both preempted and falls within the exclusive jurisdiction of the NLRB. *See, San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959); *Labor Production Industrial Workers Local No. 1054 v. West Coast Industrial Relations Association, Inc.*, 775 F.2d 1042, 1047-49 (9th Cir. 1985); *see generally* Schultz & Husband, *Federal Preemption Under the NLRA: A Rule in Search of a Reason*, 62 Denver U.L.Rev 531 (1985). A federal court may be able to take jurisdiction over a case removed from state court for the limited purpose of determining whether exclusive federal jurisdiction exists in the NLRB. Thus, the preemption analysis applied under the NLRB should be distinguished from the approach taken with regard to § 301 of the Labor Management Relations Act, although the provisions may overlap on occasion.

3 in *Williams* and *Local 1054* that defendants' position is correct. This court must assume jurisdiction for the limited purpose of determining whether exclusive federal jurisdiction over some or all of plaintiffs' causes of action exists in the NLRB. Accordingly, the court denies plaintiffs' Counter Motion for Remand to the extent that plaintiffs contend that this court may not determine whether their causes of action are preempted by the NLRA and within the exclusive jurisdiction of the NLRB.

B. Motion to Dismiss and/or For Summary Judgment

The general rule of preemption in labor cases set forth in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 243-245 (1959) is that if the activity relied on as the basis for a suit is "arguably subject to § 7 or § 8 of the NLRA, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. Defendants argue that where the Regional Director has invoked the jurisdiction of the NLRB at the behest of three of the plaintiffs, there can be no doubt that the activities about which plaintiffs complain in the action before the court is the subject of exclusive federal regulation:

> Based upon charges that are identical to the allegations in the Complaint brought by Holcomb, Vizzolini and Growdon, the Regional Director of the NLRB has issued a complaint alleging that the employees engaged in concerted actions protected by section 7 of the NLRB [sic] and that, as a consequence, Bingham Toyota committed an unfair labor practice in violation of section 8 of the NLRA by interfering with, restraining, and coercing those employees. In the Complaint before the Board, the concerted activity alleged is identical to the activity alleged in this Complaint: a refusal to contribute to a Christmas gift fund for Byrum Bingham. Likewise, the violation of section 8 alleged in the Director's Complaint is based upon the denial of contract benefits and the termination of the employees. These factual allegations are indistinguishable from the factual allegations forming the basis of the Plaintiffs' causes of action in the Complaint now before this Court.
>
> The Plaintiffs' first three causes of action, variants of wrongful discharge claims, implicate state laws of general

> application. The fourth and fifth causes of action rely respectively on California Labor Code section 1054 and California Business and Professions Code section 17200 *et seq.* Thus, these latter two actions rely on state statutes regulating activities between labor and management. The distinction, however, between the former and latter actions is of no consequence because federal law clearly proscribes the application of either when the controlled conduct is subject to federal regulation. *Garmon,* 359 U.S. at 244. In this case, where the Regional Director has invoked the jurisdiction of the Board at the behest of the Plaintiffs, there can be little doubt that the activity about which Plaintiffs complain is the subject of federal regulation. In fact, it is difficult to imagine a more clear-cut case.

Plaintiffs, citing *NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822 (1984), contend that the NLRA does not apply because they were not represented by a union and there was no collective bargaining agreement. Plaintiffs cite *City Disposal Systems, Inc.* for the proposition that the purpose of Section 7 is to assist in collective bargaining. In *City Disposal Systems, Inc.,* the Supreme Court approved the NLRB's "Interboro doctrine," which doctrine recognizes as concerted activity within the meaning of Section 7 an individual employee's reasonable and honest invocation of a right provided for in the collective bargaining agreement. The Supreme Court noted at 829 n. 6:

> 6. The NLRB has recently held that, where a group of employees are not unionized and there is no collective bargaining agreement, an employee's assertion of a right that can only be presumed to be of interest to other employees is not concerted activity. Meyers Industries, Inc. 268 NLRB 493 (1984). The Board, however, distinguished that case from the cases involving the Interboro doctrine, which is based on the existence of a collective bargaining agreement. The Meyers case is thus of no relevance here.

Plaintiff, relying on *City Disposal Systems, Inc.,* argues:

> The NLRB complaint here asserts that three of these plaintiffs engaged in protected 'concerted action.' ... The focus of that action is whether the three complainants engaged in concerted activity, within the context of

> § 7's 'labor organizing' purposes. If it were determined that these employees had merely engaged in the airing of personal 'gripes' there would be no violation of § 7. . . .
>
> The focus of the NLRB action will be to determine whether three of these plaintiffs 'joined together to achieve common goals.' . . . The mere fact that an employee raises an issue about which other employees 'ought to have a group concern' is not concerted activity. . . . The facts that there are no existing collective bargaining agreements, and that these employees were not seeking to organize a labor group, are factors in the NLRB determinations. These are the focuses of the NLRB complaint.
>
> The plaintiffs' state court complaint is quite different. These employees did not seek to organize the employees of Bingham Toyota into a bargaining unit. These employees sought to keep in their own pockets the wages that defendants had paid them. That was the extent of their aims. . . .
>
> There was no process of labor organizing here. The purposes of the NLRA are thus not served by denying to these non-unionized employees, the remedies available to them under the state law.

It appears to the court that plaintiffs' contention that the NLRA can only apply where employees are unionized and protected by a collective bargaining agreement is incorrect. It also appears that plaintiffs' argument quoted above is too simplistic. *See Meyers Industries, Inc., remanded sub nom Prill v. N.L.R.B.*, 755 F.2d 941 (D.C. Cir.), *cert. denied, Meyers Industries, Inc. v. Prill*, ____ U.S. ____,88 L.Ed.2d 294, 88 L.Ed.2d 320 (1985), *on remand, Meyers Industries, Inc.*, 281 N.L.R.B. 118 (1986). While the parties have not briefed the court concerning whether or not the conduct complained of in this action and the NLRB proceedings are protected concerted activity pursuant to the test adopted by the NLRB in *Meyers* I and reaffirmed in *Meyers* II, it appears to the court more than arguable that protected concerted activity occurred here, a fact apparently recognized by the NLRB when it issued the unfair labor practice complaint. As explained in *Meyers* I:

> In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or, on

> the authority of other employees, and not solely by or on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the protected activity, the concerted activity was protected by the Act, and the adverse employment action at issue ... was motivated by the employee's protected concerted activity.

Plaintiffs, citing *Belknap v. Hale,* 463 U.S. 491 (1983), *Sears Roebuck v. Carpenters,* 436 U.S. 180 (1978), *Farmer v. Carpenters,* 430 U.S. 290 (1977) and *Lynn v. Plant Guard Workers,* 383 U.S. 53 (1966), argue that where the NLRB proceeding and the state court action are not identical, preemption does not occur.

Defendants respond that "[p]laintiffs statement of the law, which is not totally untrue, is imprecise." Defendants argue that if the potentially conflicting laws are brought to bear on precisely the same conduct, the state law claims are preempted.

The court has reviewed the cases relied upon by plaintiffs and defendants in light of their respective arguments. In the court's opinion, the second, third and fifth causes of action are preempted because the focus and the conduct are identical in the two proceedings. The court also concludes that the first cause of action is also preempted, the court being unimpressed with plaintiffs' conclusory allegation of discharge in violation of unspecified state policies. *See Evangelista v. Inland-Boatmen's Union of Pacific,* 777 F.2d 1390, 1401 (9th Cir. 1985); *De Soto v. Yellow Freight Systems, Inc.,* 811 F.2d 1333, 1335-1336 (9th Cir. 1987).[1]

The court concludes, however, that the fourth cause of action is not preempted. The court cannot fathom how the

[1] Defendants, noting that plaintiffs seek damages for damage to reputation and emotional and mental distress damages in paragraph 39 of the first cause of action, and concerned that plaintiffs would seek to invoke the exception to preemption set forth in *Farmer v. Carpenters, supra,* wherein the Supreme Court held that the NLRA did not preempt a state tort action for intentional infliction of emotional distress, argued that *Farmer* is inapplicable. The court does not discuss this issue because plaintiffs have not pled such a cause of action and they do not argue that the allegations of paragraph 39 come within *Farmer.*

alleged actions by defendants occurring after plaintiffs were terminated has any relevance to the policies of the NLRA. At oral argument, defendants stated that the Ninth Circuit in *Local 1054, supra* held preempted a state law claim for interference with prospective economic advantage. The court does not read *Local 1054* as controlling the issue before the court with respect to the fourth cause of action. In *Local 1054, supra* at 1047-1049, the Ninth Circuit held to be preempted the union's state law claim against labor consultants for tortious interference with a prospective contractual relationship, i.e., the collective bargaining relationship.

The court having determined that all causes of action except the fourth cause of action are preempted by the NLRA and within the exclusive jurisdiction of the NLRB, the court dismisses the first, second, third, and fifth causes of action. The fourth cause of action is remanded to state court, this court having no jurisdiction to hear it.

DATED: July 30, 1987.

/s/
Robert E. Coyle
United States District Judge

APPENDIX D

United States of America

Before the National Labor Relations Board
Region 32

BINGHAM TOYOTA, INC.

and Case 32-CA-8678

MICHAEL HOLCOMB. An Individual

and Case 32-CA-8712

DAVID GROWDON. An Individual

and Case 32-CA-8713

RICHARD VIZZOLINI. An Individual

ORDER CONSOLIDATING CASES AND CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

It having been charged by Michael Holcomb, an individual, in Case 32-CA-8678; by David Growdon, an individual, in Case 32-CA-8712; and by Richard Vizzolini, an individual, in Case 32-CA-8713, that Bingham Toyota, Inc., herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay,

HEREBY ORDERS, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that Cases 32-CA-8678, 32-CA-8712 and 32-CA-8713 be, and they hereby are, consolidated.

Said cases having been consolidated for hearing, the General Counsel of the Board, by the undersigned, pursuant

to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Consolidated Complaint and Notice of Hearing and alleges as follows:

1.

(a) The charge in Case 32-CA-8678 was filed by Michael Holcomb on February 2, 1987, and a copy thereof was served on Respondent by certified mail on or about February 3, 1987.

(b) The charge in Case 32-CA-8712 was filed by David Growdon on February 12, 1987, and a copy thereof was served on Respondent by certified mail on or about February 13, 1987.

(c) The charge in Case 32-CA-8713 was filed by Richard Vizzolini on February 12, 1987, and a copy thereof was served on Respondent by certified mail on or about February 13, 1987.

2.

(a) At all times material herein, Respondent, a California corporation with an office and place of business in Clovis, California, has been engaged in the retail sale and servicing of automobiles and trucks.

(b) During the past twelve months, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000.

(c) During the past twelve months, Respondent, in the course and conduct of its business operations, purchased and received goods or services valued in excess of $5,000 which originated outside the State of California.

3.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4.

At all times material herein, the following-named individuals occupied the positions set forth opposite their respective names, and are now, and have been at all times material herein, supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

B.C. Bingham	—President
Craig Tucker	—General Manager
Robert Downs	—Sales Manager
Gilbert Douglas Thompson	—Sales Manager

5.

(a) Respondent, at its Clovis, California facility:

(1) On or about December 10, 1986, acting through Craig Tucker, informed employees that Respondent would make a number of "changes" in their working conditions, including eliminating weekly bonus programs for its sales employees.

(2) On or about December 10 and 12, 1986, acting through Craig Tucker, harassed an employee by ordering him to get his hair cut.

(3) On or about December 10, 1986, acting through Craig Tucker, interrogated an employee.

(4) On an unknown date in mid-December 1986, acting through Robert Downs, threatened an employee that Respondent would eliminate certain benefits theretofore enjoyed by

its sales employees, including a "house deal" program and the use of demonstrator vehicles.

(5) On or about December 12, 1986, acting through Robert Downs, informed employees that Respondent was going to deny "house deals" to its sales employees, deny them the use of demonstrator vehicles, and make adverse changes in their working hours and shifts.

(6) On or about December 15, 1986, acting through Craig Tucker, made a veiled threat of retaliation against employees.

(7) On or about December 17, 1986, acting through B.C. Bingham, informed an employee who had just been terminated that he had been discharged because of his protected concerted activities.

(8) On or about December 21, 1986, acting through Gilbert Douglas Thompson, informed employees that another employee had been terminated because Respondent suspected that he was the employee most responsible for employees' concerted activities.

(b) On an unknown date in late January 1987, Respondent, acting through Gilbert Douglas Thompson, at a cocktail lounge in Clovis, California, informed employees that things would get "worse and worse" for them because of their concerted activities.

6.

On or about the dates set forth below, Respondent discharged the following employees, and since said dates has failed and refused, and continues to fail and refuse, to reinstate them to their former positions of employment:

(a) Michael Holcomb —December 17, 1986
(b) David Growdon —February 2, 1987
(c) Richard Vizzolini —February 2, 1987

7.

Respondent engaged in the acts and conduct described above in paragraphs 5(a) and (b) and 6 because of, and/or concerning, its employees' actual or perceived engagement in protected concerted activities, including but not limited to concertedly questioning and/or protesting Respondent's "request" for contributions towards a Christmas gift for B.C. Bingham.

8.

By the acts and conduct described above in paragraphs 5, 6 and 7, and by each of said acts, Respondent has interfered with, restrained and coerced, and is interfering with, restraining and coercing, employees in the exercise of the rights guaranteed in Section 7 of the Act, and Respondent thereby has been engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above, the General Counsel seeks an order providing that Respondent:

> Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply therewith. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from Respondent, its officers, agents, successors or assigns, or any other person having knowledge, concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

The General Counsel further prays for such other relief as may be just and proper to remedy the unfair labor practices herein alleged.

PLEASE TAKE NOTICE that on the 13th day of May, 1987, at 9:00 a.m. Pacific Daylight Time, in Fresno, California, at a place to be designated, and continuing on consecutive days

thereafter until completed, a hearing will be conducted before a duly designated Administrative Law Judge of the Board on the allegations set forth in the above Consolidated Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondent shall file with the undersigned, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to said Consolidated Complaint within fourteen (14) days from today and that unless it does so, all of the allegations in the Consolidated Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

DATED AT Oakland, California, this 18th day of March, 1987.

/s/
JAMES S. SCOTT,
REGIONAL DIRECTOR
National Labor Relations Board
Region 32
P.O. Box 12983
Oakland, California 94604

APPENDIX E

Superior Court of California

COUNTY OF FRESNO

No. 362770-0

MICHAEL HOLCOMB, *et al.*,

Plaintiffs,

v.

BINGHAM TOYOTA, INCORPORATED, *et al.*,

Defendants.

COMPLAINT FOR DAMAGES
(Wrongful Discharge)

INTRODUCTION

1. This is an action brought by four persons formerly employed by the defendants as salespersons. The plaintiffs assert that they were wrongfully discharged from their employment in retaliation for their refusal to give up a portion of their wages as a kickback to the defendants, in an amount which the defendants claimed would be used to purchase a "Christmas gift" for defendant Byrum Bingham. The discharge of these defendants was in violation of the public policy of California. The plaintiffs assert also that the defendants have by means of misrepresentation, interfered with plaintiffs' efforts at reemployment in violation of California law.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

2. Plaintiffs Michael Holcomb, Richard Vizzolini, David Growdon and Robert Posch are and at all times referred to here were residents of the County of Fresno, California.

3. Defendant Bingham Toyota, Incorporated is, upon information and belief, a corporation existing under the laws

of California engaged in the business of selling at retail new and used cars and trucks to the public.

4. Defendant Byrum Bingham is, upon information and belief, an individual who, at all relevant times, was a resident of Fresno County, California, and was a majority owner and President or chief officer of Defendant Bingham Toyota, Incorporated.

5. Defendant Craig Tucker is, upon information and belief, an individual who, at all relevant times, was a resident of Fresno County, California, and was a minority owner and the general manager of Defendant Bingham Toyota, Incorporated.

6. The true names and capacities, whether corporate, individual, or partnership, of defendants sued here as DOES I through X are as of this time unknown to plaintiffs who therefor sue them by such fictitious names. When the true names and capacities of said defendants are ascertained, the plaintiffs will amend their complaint to insert the true names and capacities.

7. Plaintiffs are informed and believe, and therefor allege that each of the defendants, including the DOE defendants, is jointly and severally liable as a principal, agent, master, servant, employer, employee or partner of each of the remaining defendants and was, in doing the acts complained of here, acting within the scope of such agency, employment, or partnership authority.

ALLEGATIONS CONCERNING MICHAEL HOLCOMB

8. Michael Holcomb ("Mr. Holcomb") began his employment with defendants on approximately August 13, 1982, as a salesperson. At all times since that date, the terms and conditions of Mr. Holcomb's employment were governed by an oral employment agreement between Mr. Holcomb and defendants. Pursuant to the employment agreement, Mr. Holcomb was paid a commission for all vehicles sold, and was provided benefits including a "demonstrator" car for his personal use, and medical, dental and life insurance benefits.

9. Mr. Holcomb has performed each and every condition and covenant required on his part to be performed pursuant to the employment agreement, and was consistently the highest, or second-highest volume salesman on a monthly basis, in the defendants' employ.

10. During Mr. Holcomb's period of employment, the defendants commended him for his sales performance, did not seriously criticize his working habits or sales performance, and by acts, words and conduct assured him that he would enjoy continued employment so long as his sales performance was good.

11. During December of each year of Mr. Holcomb's employment, defendants required each employee of defendants to pay, as a condition of continued employment, a specified sum of money to defendants to be used to purchase a "Christmas gift" for defendant Byrum Bingham. Until December, 1986, Mr. Holcomb always paid the amount demanded, amounts which began at $25.00 and increased to $100.00. On or about December 10, 1986, Mr. Holcomb stated to defendant Craig Tucker that he would not pay the amount demanded, $100.00, for that year's "gift." Defendant Tucker responded that Mr. Holcomb would "pay" for his failure to pay the amount demanded.

12. Approximately one week later, on December 17, 1986, defendant Craig Tucker announced that the entire salesforce, including Mr. Holcomb, would no longer be provided with "demonstrator" cars for their personal use. That afternoon, Mr. Holcomb was fired by defendants Tucker and Bingham. Upon information and belief, Mr. Holcomb asserts that he was fired because he refused to pay the amounts demanded for Byrum Bingham.

ALLEGATIONS CONCERNING RICHARD VIZZOLINI

13. Richard Vizzolini ("Mr. Vizzolini") began working for defendants on or about October, 1983, as a salesperson. At all times since that date, the terms and conditions of Mr. Vizzolini's employment were governed by an oral employ-

ment agreement between him and defendants. Pursuant to the employment agreement, Mr. Vizzolini was paid a commission for all vehicles sold, and was provided benefits including a "demonstrator" car for his personal use, and medical, dental and life insurance benefits.

14. Mr. Vizzolini has performed each and every condition and covenant required on his part to be performed pursuant to the employment agreement, and was consistently ranked as the number one salesman of defendants' salesforce [sic] as measured by both number of units sold and commission dollars earned on a monthly basis.

14. [sic] During Mr. Vizzolini's period of employment, the defendants commended him for his sales performance, did not seriously criticize his working habits or sales performance, and by acts, words and conduct assured him that he would enjoy continued employment so long as his sales performance was good.

15. During December of each year of Mr. Vizzolini's employment, defendants required each employee of defendants to pay, as a condition of continued employment, a specified sum of money to defendants to be used to purchase a "Christmas gift" for defendant Byrum Bingham. Until December, 1986, Mr. Vizzolini always paid the amount demanded, amounts which began at $25.00 and increased to $100.00. On or about December 10, 1986, Mr. Vizzolini stated to defendant Craig Tucker that he would not pay the amount demanded, $100, for that year's "gift."

16. Following the December 10th, statement of refusal, Mr. Vizzolini was told by defendant Tucker that there would be "changes" as a result of the failure to pay the amounts demanded for the "gift." Mr. Vizzolini was told that the defendants Tucker and Bingham would "get" those salespersons who had refused to pay the $100 price of continued employment.

17. On December 17, 1986, defendant Tucker announced that the sales force would no longer be entitled to the use of "demonstrator" cars. "Demonstrator" cars were

in fact removed from the salesforce [sic] on approximately January 1, 1987, though other employees continued to have the benefit of personal use of such cars. Subsequently, in February, 1987, the defendants denied to the salesforce [sic] the commissions paid the salesforce [sic] through various incentive programs.

18. On approximately February 7, 1987, Mr. Vizzolini and plaintiff David Growdon met with defendants Bingham and Tucker for the purpose of asking for the defendants' explanation for Mr. Holcomb's discharge. Defendants informed them that employees had "no rights" and they too, were discharged. Upon information and belief, Mr. Vizzolini asserts that he was discharged for failing to pay the money demanded as a "gift" and for questioning the fact that another sales person [sic] was fired for failing to pay the money demanded as a "gift".

ALLEGATIONS CONCERNING DAVID GROWDON

19. David Growdon ("Mr. Growdon") began working for defendants on or about May 2, 1983, as a salesperson. At all times since that date, the terms and conditions of Mr. Growdon's employment were governed by an oral employment agreement between him and defendants. Pursuant to the employment agreement, Mr. Growdon was paid a commission for all vehicles sold, and was provided benefits including a "demonstrator" car for his personal use, and medical, dental and life insurance benefits.

20. Mr. Growdon has performed each and every condition and covenant required on his part to be performed pursuant to the employment agreement, and was consistently ranked in the top four of defendants' salesforce [sic] as measured by both number of units sold and commission dollars earned, on a monthly basis.

21. During Mr. Growdon's period of employment, the defendants commended him for his sales performance, did not seriously criticize his working habits or sales performance, and by acts, words and conduct assured him that he would

enjoy continued employment so long as his sales performance was good.

22. During December of each year of Mr. Growdon's employment, defendants required each employee of defendants to pay, as a condition of continued employment, a specified sum of money to defendants to be used to purchase a "Christmas gift" for defendant Byrum Bingham. Until December, 1986, Mr. Growdon always paid the amount demanded, amounts which began at $25.00 and increased to $100.00. On or about December 10, 1986, Mr. Growdon stated to defendant Craig Tucker that he would not pay the amount demanded, $100, for that year's "gift."

23. Following the December 10th, statement of refusal, Mr. Growdon was told by defendant Tucker that there would be "changes" as a result of the failure to pay the amounts demanded for the "gift." Mr. Growdon was told that the defendants Tucker and Bingham would "get" those salespersons who had refused to pay the $100 price of continued employment.

24. On December 17, 1986, defendant Tucker announced that the sales force would no longer be entitled to the use of "demonstrator" cars. "Demonstrator" cars were in fact removed from the salesforce [sic] on approximately January 1, 1987, though other employees continued to have the benefit of personal use such cars. Subsequently, in February, 1987, the defendants denied to the salesforce [sic] the commissions paid the salesforce [sic] through various incentive programs.

25. On approximately February 7, 1987, Mr. Vizzolini and Mr. Growdon met with defendants Bingham and Tucker for the purpose of asking for the defendants' explanation for Mr. Holcomb's discharge. Defendants informed them that employees had "no rights" and they too, were discharged. Upon information and belief, Mr. Growdon asserts that he was discharged for failing to pay the money demanded as a "gift" and for questioning the fact that another sales person [sic] was fired for failing to pay the money demanded as a "gift".

ALLEGATIONS CONCERNING ROBERT POSCH

26. Robert Posch ("Mr. Posch") began working for defendants on or about January, 1985, as a salesperson. At all times since that date, the terms and conditions of Mr. Posch's employment were governed by an oral employment agreement between him and defendants. Pursuant to the employment agreement, Mr. Posch was paid a commission for all vehicles sold, and was provided benefits including a "demonstrator" car for his personal use, medical, dental and life insurance benefits.

27. Mr. Posch has performed each and every condition and covenant required on his part to be performed pursuant to the employment agreement, and was consistently ranked in the top four of defendants' salesforce [sic] as measured by both number of units sold and commission dollars earned, on a monthly basis.

28. During Mr. Posch's period of employment, the defendants commended him for his sales performance, did not seriously criticize his working habits or sales performance, and by acts, words and conduct assured him that he would enjoy continued employment so long as his sales performance was good.

29. During December of each year of Mr. Posch's employment, defendants required each employee of defendants to pay, as a condition of continued employment, a specified sum of money to defendants to be used to purchase a "Christmas gift" for defendant Byrum Bingham. In December, 1985, Mr. Posch had refused initially to pay the amount demanded; defendant Tucker then informed him in a personal meeting that such payments were a condition of continued employment, and Mr. Posch made his required payment of $100 that year. On or about December 10, 1986, Mr. Posch stated to defendant Craig Tucker that he would not pay the amount demanded, $100, for that year's "gift."

30. Following the December 10, statement of refusal, Mr. Posch was told by defendants' sales manager that the refusal to pay the amounts demanded for the "gift" would

result in losses of commissions earned through various incentive programs and loss of "demonstrator" cars, a benefit of employment which had been provided throughout his tenure in defendants' employ.

31. On December 17, 1986, defendant Tucker announced that the sales force would no longer be entitled to the use of "demonstrator" cars. "Demonstrator" cars were in fact removed from the salesforce [sic] on approximately January 1, 1987, though other employees continued to have the benefit of personal use such cars. Subsequently, in February, 1987, the defendants denied to the salesforce [sic] the commissions paid the salesforce [sic] through various incentive programs.

32. Mr. Holcomb was fired on December 17, 1986. Mr. Posch was informed and therefor [sic] believes that Mr. Holcomb was fired for his refusal to make the required contribution to the Bingham "gift." Mr. Vizzolini and Mr. Growdon were fired in February, 1987. Mr. Posch was informed and therefor believes that Mr. Vizzolini and Mr. Growdon were fired because they refused to pay the amounts demanded for Byrum Bingham.

33. Shortly after Mr. Vizzolini and Mr. Growdon were fired, defendant Tucker informed Mr. Posch that a complaint had been made to a governmental agency about their discharge. On numerous occasions thereafter, defendants made it known to me that they expected me not to be truthful to any investigator of such an agency, concerning the fact that the three salesmen were fired for not paying the annual amounts demanded of them by defendants. Defendants offered Mr. Posch incentives for not being truthful in any ensuing investigation, including opportunities to drive expensive cars. Defendants instructed Mr. Posch that his continued employment was contingent upon his not talking with other salespersons about the true reasons for the discharge of Mr. Holcomb, Mr. Vizzolini and Mr. Growdon. Defendants regularly confronted Mr. Posch with the contention that his refusal to cooperate with them constituted a "bad attitude" and that he should "quit" so that he could join the three that were discharged.

34. Mr. Posch, as a direct result of defendants' actions, suffered anxiety, worry, depression, loss of appetite, and nausea, and a consequent inability to continue to be a successful salesman, all of which amounted to a constructive discharge causing Mr. Posch to cease employment with the defendants on or about March 5, 1987.

FIRST CAUSE OF ACTION

(Wrongful Discharge—Violation of Public Policy)

35. Paragraphs one through 35 above are incorporated here as if fully set forth.

36. The defendants' termination of Mr. Holcomb, Mr. Vizzolini, Mr. Growdon and Mr. Posch was wrongful and a violation of the fundamental principles of public policy of the State of California as reflected in its statutes and regulations designed to protect all employees' wages and benefits as the employees' personal property. The terminations of the plaintiffs were wrongful in that they were for the purpose of punishing the plaintiffs for, and in retaliation against the plaintiffs' conduct in seeking to protect their wages and benefits.

37. As a result of the employment relationship between defendants and each individual plaintiff, the defendants were obliged to refrain from discharging each individual plaintiff, or any other employee, for reasons which violate or circumvent the policy and laws of California, or the objectives which underlie each.

38. As a direct result of the acts described here, Mr. Holcomb, Mr. Vizzolini, Mr. Growdon and Mr. Posch have each suffered lost wages and benefits, and will continue to do so for the forseeable future.

39. Each individual plaintiff has suffered because of these acts, damages to his reputation, emotional and mental distress and anguish, embarrassment and humiliation, all to their damage in amounts to be proven at trial.

40. The acts of the individual defendants as described here, were willful, malicious, oppressive and done with con-

scious disregard of the plaintiffs' rights and with the design and intent of injuring them. Each plaintiff is therefor [sic] entitled to punitive damages.

SECOND CAUSE OF ACTION
(Wrongful Discharge—Implied Covenant Of Good Faith and Fair Dealing)

41. Plaintiffs incorporate paragraphs one through 40 above as if fully set forth here.

42. As an employee of the defendants, the plaintiffs were subject to the defendants' policy of not terminating sales force employees unless that employee failed to achieve acceptable numbers of sales, and had first been warned and provided an opportunity to improve sales performance. As a result of this policy and the acts and omissions set forth here, the laws of the State of California implied as part of the plaintiffs' employment agreements with the defendants a covenant of good faith and fair dealing whereby neither party to these agreements would take any action to deprive the other of the benefits of the agreements.

43. Defendants' termination of each plaintiff was wrongful, in bad faith and unfair, and therefore a violation of defendants' legal duties, in that there was no good cause for the termination in that Mr. Holcomb, Mr. Vizzolini, Mr. Growdon and Mr. Posch were themselves the four best salesmen in defendants' employ; there was a wrongful denial of and failure to comply with defendants' practice of providing notice concerning discharge; the reasons given for each discharge were pretextual; and each discharge was in conscious or reckless disregard of each plaintiffs' known rights.

THIRD CAUSE OF ACTION
(Wrongful Discharge—Breach of Contract)

44. Plaintiffs incorporate paragraphs one through 40 above as if fully set forth.

45. As a result of the acts and omissions set forth here, defendants impliedly promised to each plaintiff that he would

not be discharged without just and sufficient cause related to an inability to sell reasonable numbers of cars.

46. Defendants' wrongful and arbitrary conduct amounted to a breach of their agreements with each individual plaintiff in that each was terminated despite exceptional records of sales.

47. As a direct and proximate result of defendants' wrongful conduct, each plaintiff has suffered and will continue to suffer loss of wages and benefits, and loss of reputation and standing in the car industry, thus precluding or diminishing each of their opportunities for future employment.

FOURTH CAUSE OF ACTION
(Violation of Statute)

48. Plaintiffs incorporate paragraphs one through 40 above, as if fully set forth.

49. Plaintiffs are informed and believe, and therefor [sic] allege, that defendant Bingham and his agents or employees, have misrepresented to prospective employers of the plaintiffs the terms, conditions and manner of performance by the plaintiffs of their employment with defendants. Such misrepresentations have prevented, or were attempts to prevent, and may in the future prevent the plaintiffs from obtaining employment suitable to their skills, experience and qualifications.

50. Plaintiffs have in fact been unable to secure employment suitable to their skills and qualifications at the level of remuneration to which they were accustomed in defendants' employ.

51. The acts of defendants described here are violations of the California Labor Code. Each plaintiff is entitled by law to their actual damages multiplied by three. Labor Code § 1054.

52. As a direct and proximate result of defendants' actions, plaintiffs have been damaged by the denial to them

of employment opportunities for which they are fully qualified, and they are therefor [sic] entitled to damages in amounts to be proven at trial, trebled in accordance with law.

FIFTH CAUSE OF ACTION
(Unfair and Unlawful Business Practice)

53. Plaintiffs incorporate paragraphs one through 40 above as if fully set forth here.

54. Upon information and belief, on behalf of themselves and the general public, including all present and former employees of defendants, plaintiffs assert that the defendants have over the course of many years required each employee to pay an annual fee to defendants, allegedly as a "gift" to their employer, as a condition of retaining their jobs.

55. The requirement that employees pay a fee to their employer for the privilege of retaining employment is a violation of California statutes and regulations, and is an unfair and deceptive business practice within the meaning of the California Business and Professions Code Section 17200.

56. Upon information and belief, plaintiffs assert that the defendants threaten to continue this unlawful and unfair practice. Plaintiffs and the general public, including the present and former employees of defendants, have no adequate remedy at law for the injuries suffered in the past and to be suffered in the future, in that the victims of such unfair and unlawful practices would be forced to institute a multiplicity of lawsuits to obtain adequate compensation for their injuries.

57. Plaintiffs and the general public, including the present and former employees of the defendants, have been damaged by defendants' unlawful and unfair business practices in amounts to be proven at trial, and seek recovery for these damages pursuant to Business and Professions Code § 17203 including reimbursement of all losses suffered by all such persons in the past.

WHEREFOR [sic], Plaintiffs pray for judgment as follows:

1. For actual damages including lost wages and benefits in amounts to be proven at trial;

2. For compensatory damages in amounts to be proven at trial;

3. For punitive damages in the amount of 1.5 million dollars for each plaintiff;

4. Under the Fifth Cause of Action, for actual damages in amounts to be proven at trial, and for injunctive relief to restrain defendants from engaging in unlawful, unfair and deceptive practices in the future by requiring employees to pay an annual fee to defendants as a condition of retaining their employment.

5. For costs, attorneys' fees (pursuant to the Fifth Cause of Action), and such other and further relief as this court deems just and proper.

DATED: March 17, 1987.

MARSH & WILLIAMS

/s/
Scott W. Williams
Attorney for Plaintiffs

APPENDIX F
Text of Statutes Involved

United States Code, Judiciary and Judicial Procedure

28 U.S.C. Section 1441(b)

Actions Removable Generally

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. Section 1331

Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1337(a)

Commerce and Antitrust Regulations; Amount in Controversy, Costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies; *provided, however,* That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

National Labor Relations Act

29 U.S.C. Section 157

Right of Employees as to Organization, Collective Bargaining, Etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title.

29 U.S.C. Section 158(a)

Unfair Labor Practices.
(a) Unfair Labor Practices by Employer.

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to Section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a

condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in Section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.